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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GLOVER ALLISON,

Appellant,

v.

THE FULTON-DEKALB HOSPITAL AUTHORITY,

Appellee.

ORIGINAL COPY

NO. 79-6743

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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July 29, 1980

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GLOVER ALLISON, Appellant, v. THE FULTON-DEKALB HOSPITAL AUTHORITY, Appellee.	)	NO. 79-6743

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Appellee, The Fulton-Dekalb Hospital Authority, moves to dismiss the appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Georgia on the following grounds: (i) the appeal does not present a substantial federal question; (ii) the federal question sought to be reviewed was not timely raised; and (iii) the judgment rests on an adequate non-federal basis.

OPINION BELOW

This cause was originally heard on March 26, 1979 before the State Court of Fulton County, Georgia, sitting without a jury, and was styled as The Fulton-Dekalb Hospital Authority, T/A Grady Memorial Hospital v. Glover Allison,

Civil Action No. 520625. The judgment of the trial court for plaintiff and denial of the Motion for New Trial are not and will not be reported.

The decision of the trial court was appealed to the Supreme Court of Georgia, styled as Allison v. The Fulton-Dekalb Hospital Authority, No. 35689. The February 26, 1980 decision of the Supreme Court of Georgia to affirm the trial court's decision and the March 13, 1980 denial of the Motion for Rehearing are reported at 245 Ga. 445, _____ S.E.2d _____ (1980).

QUESTION PRESENTED

Should the Supreme Court of the United States take jurisdiction on appeal of a case challenging the constitutionality of a statute, where that statute has been repealed and entirely superseded by a new statute lacking any alleged constitutional infirmities?

STATUTES INVOLVED

1. The new and current Ga. Code Ann. §74-105, enacted in 1979 and effective April 4, 1979, provides:

> "Until majority, it is the joint and several duty of each parent to provide for the maintenance, protection, and education of the child, except to the extent that the duty of one parent is otherwise or further deferred by court order." (Ga. Laws 1979, pp. 466, 492)

2. Former Ga. Code Ann. §74-105, repealed as of April 4, 1979, provided:

> "Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child."

STATEMENT OF THE CASE

On February 5, 1975, The Fulton-Dekalb Hospital Authority [hereinafter the "Appellee"] filed its complaint

against Glover Allison [hereinafter the "Appellant"], for hospital expenses incurred the previous August by his 16-year-old daughter during the birth of her illegitimate child. The Authority had no written contract with Appellant, but contended that Appellant was liable under Georgia's parental child support statute in effect at that time. (Ga. Code Ann. §74-105).

On March 11, 1975, Appellant answered with a general denial. During April, 1976, Appellee answered interrogatories showing that the patient was a minor at the time of her admission to Grady Memorial Hospital; that there was no express agreement by any person to pay the bills for her medical treatment; and that Appellant had been billed because he was the father of the minor patient. Even though counsel for Appellant knew or should have known at that time that Appellee was charging Appellant for the hospital expenses under Ga. Code Ann. §74-105, Appellant made no constitutional challenge to the statute at that time.

On March 5, 1979, two years and eleven months later, the Supreme Court of the United States announced its decision in Orr v. Orr, 440 U.S. 268 (1979). On March 29, 1979, Appellant amended his pleadings to add a constitutional challenge to former Ga. Code Ann. §74-105, alleging that it was in violation of the equal protection clause of the Fourteenth Amendment. Prior to that date, Appellant had not included any constitutional challenge to the statute in his pleadings even though Appellant had full opportunity to do so. Appellant had, however, obtained four continuances since the original complaint was filed, and during the four years prior to the Orr decision.

The trial court allowed Appellant's amendment but held that the alleged constitutional defense should not be given retroactive effect and that Appellant was nevertheless

liable under the common law of Georgia making the father liable for the necessary expenses of a minor child.

On appeal, the Supreme Court of Georgia affirmed and additionally held that Appellant's constitutional challenge was not timely raised in the trial court.

Thereafter, Appellee waived its right to respond to Appellant's appeal to this Court but was subsequently directed by the Clerk to do so on or before July 31, 1980.

ARGUMENT

This Appeal Should Be Dismissed, Or, In The Alternative, The Judgment Should Be Affirmed For At Least Three Reasons, Each Of Which Are Discussed Hereinbelow.

I. No Substantial Federal Question Is Present.

Until April 4, 1979, Ga. Code Ann. §74-105 stated in its entirety:

> "Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child."

Subsequent to the decision in Orr and with the express purpose of complying with the equal protection standards established by this Court in that case, the General Assembly of Georgia repealed this section in its entirety and enacted a new §74-105, completely superseding the former section. Ga. Laws 1979, pp. 466, 492. The new and current §105 states in whole:

> "Until majority, it is the joint and several duty of each parent to provide for the maintenance, protection, and education of the child, except to the extent that the duty of one parent is otherwise or further defined by court order.

This action commenced as a suit against Appellant for a hospital bill under former Ga. Code Ann. §74-105. This

Court has consistently held that when the jurisdiction of a cause of action depends on a statute, the repeal of that statute takes away the Court's jurisdiction and the cases pending at that time fall with the law, unless they are saved by a provision of the statute. Bruner v. United States, 343 U.S. 112 (1952). No judgment will be rendered in a case after the act upon which the case is brought and prosecuted is repealed, and in such a case the Court no longer has jurisdiction of the appeal. Re McCardle, 74 U.S. 264 (7 Wall. 1869).

This appeal is based on the allegation that the former Code §74-105 is void under the equal protection clause of the United States Constitution. The former Code §74-105 was repealed after suit was filed. No provision exists in the new statute to save cases pending at the time of repeal. As thus viewed, no substantial federal question is present and this Court has no jurisdiction to hear this appeal.

II. No Present, Live Controversy Exists.

When the Supreme Court of the United States is to determine the constitutionality of a statute, it must examine the statute as it appears on appeal rather than as the statute existed when the District Court ruled on it. California Bakers Assoc. v. Shultz, 416 U.S. 21 (1974). Furthermore, if the Supreme Court is called on to apply a statute, it must apply the law in effect at the time of its review. Kremens v. Bartley, 431 U.S. 119 (1977); Fusari v. Steinberg, 419 U.S. 379 (1975). A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the new law. Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). Therefore, if the Court is to examine the constitutionality of Code §74-105, it must examine the statute as it now stands, placing the duty of providing the necessary expenses for a minor child jointly and severally on each parent, rather than the statute as it was formerly, placing the duty on the father.

Neither Appellant nor Appellee challenge the constitutionality of the new and current Ga. Code Ann. §74-105. To hear an appeal based on the constitutionality of a state statute, this Court requires that a present, live controversy exist. Kremens v. Bartley, 431 U.S. 119, (1977); Sosna v. Iowa, 419 U.S. 393 (1975). Where the statute in question has been repealed subsequent to a lower court's decision but prior to the Supreme Court's decision, the Supreme Court will vacate the judgment of the lower court and remand the case with instructions to dismiss the case as moot or allow appellants to amend their pleadings. Hall v. Beals, 396 U.S. 45 (1969); Diffenderfer v. Central Baptist Church of Miami, Florida, 404 U.S. 412 (1972). Where a statute's application is challenged on constitutional grounds and that statute is subsequently repealed, being replaced by a new state act absent of the constitutional infirmities, the action has lost its character as a present, live controversy of the kind that must exist if the Court is to avoid advisory opinions of law. Id.

Because of the repeal of former Ga. Code Ann. §74-105, this Court must therefore examine Code §74-105 as it appears on appeal. The parties are not in controversy regarding the constitutionality of the current Code §74-105, and accordingly, the requsite present, live controversy does not exist. It thus follows that this Court should dismiss the appeal.

III. The State Courts Rested Their Decisions On Independent And Adequate Grounds Of State Law, Any Of Which Alone Could Have Been Dispositive Of The Case, Without Reference To The Constitutionality Of Former Ga. Code Ann. §74-105.

In this case, the trial court did not render its decision solely on former Code §74-105. Rather, the decision is premised upon two independent and adequate grounds of state law. First, the trial court held Appellant liable under Georgia's common law making the father liable for the necessary expenses of a minor child, and, secondly, the trial court held that Appellant's constitutional defense to liability under Code §74-105 should not be given retroactive effect, where Appellant claimed that his debt incurred for necessary medical treatment to his daughter in 1974 should be annulled by an act passed in 1979 making the mother equally responsible.

On appeal, the Supreme Court of Georgia affirmed the trial court's decision on grounds regarding Appellant's constitutional challenge to Code §74-105, as well as the independent state procedural ground that Appellant's constitutional challenge was not timely raised. Specifically, the Georgia Supreme Court relied on well-established Georgia law that constitutional challenges must be made at the first opportunity, Brackett v. State, 227 Ga. 493, 181 S.E.2d 380 (1971), and that constitutional challenges should be made as soon as the Appellant's attorney is aware of the law in question. 5 E.G.L. 530, Constitutional Law, §182. In so doing, the court noted that Appellant did not raise his constitutional challenge until two years and eleven months after Appellee answered interrogatories showing that Appellant was billed for his daughter's care because he was her father and stated that Appellant's attorney knew or should have known about the applicable law as of the time he received Appellee's answers to interrogatories. It further noted that Appellant did not file his constitutional challenge to the law until after Orr v. Orr was announced and held that Appellants are not allowed to indefinitely await asserting constitutional challenges, hoping that a decision will

become available providing a constitutional defense. Allison v. The Fulton-Dekalb Hospital Authority, 245 Ga. 445, _____ S.E.2d _____ (1980).

It is fundamental that this Court has no jurisdiction when a state court rests its decision on both state and federal grounds, either of which could have been dispositive. Zacchini v. Scripps - Howard Broadcasting Co., 433 U.S. 562 (1977); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U.S. 157 (1917). Further this Court is without power to hear a constitutional argument when the state court's decision is based on an independent and adequate state ground, Orr v. Orr, 440 U.S. 268 (1979).

In the instant case, it is clear that the Georgia courts rested their decisions on three independent state grounds: (i) Georgia common law imposing liability on the father to pay the necessary expenses of his minor child; (ii) Georgia law that a constitutional challenge should not be applied retroactively so as to nullify a debt already incurred; and (iii) Georgia procedural law requiring constitutional challenges to be asserted at the first opportunity and as soon as a litigant's attorney is aware of the applicable law. Each and all of these constitute independent state holdings for the judgment that are adequate and dispositive, and accordingly, this Court lacks jurisdiction to hear this case on appeal.

CONCLUSION

Simply stated, this appeal raises no substantial federal question; the federal question sought to be reviewed was not timely raised; and the judgment rests on independent and adequate state grounds.

For all these reasons and on the authorities herein cited, we respectfully submit that Appellee's Motion to Dismiss this Appeal, or, in the alternative, affirm the judgment of the Supreme Court of Georgia should be granted.

Respectfully submitted,

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